Jennifer Patricia a/p Thomas v Calvin Martin a/l Victor David

HIGH COURT (SEREMBAN) — ORIGINATING SUMMONS NO 24–287 OF 2004

LOW HOP BING J

15 AUGUST 2005

Family Law — Children — Custodianship — Interim order for custody, control and guardianship of two children of marriage — Application for

Family Law — Children — Custodianship — Restraining order from removing children from plaintiff's custody without plaintiff's consent and from taking children out of Malaysia — Application for

Family Law — Financial obligation — Maintenance — Application for maintenance of wife and children

Family Law — Matrimonial property — Application to disallow defendant from entering matrimonial home — Domestic Violence Act 1994 ss 5, 6, 6(1), 6 (2), 6(2)(a), (b) & 13

Family Law — Relations between husband and wife — Exclusion order — Restraining order from assaulting, molesting, interfering or tampering with, threatening or otherwise beating the plaintiff and children — Application for — Law Reform (Marriage and Divorce) Act 1976 ss103 & 106

The defendant ('the husband') purchased the house which was registered in the husband's name. The parties registered their civil marriage on 19 December 1995. The parties solemnised their religious marriage. They resided with the plaintiff's ('the wife') parents. The parties were blessed with two children. The parties encountered problems in their marriage, after which the husband had denied the wife entry to the house. However, on 5 March 2004, the wife moved into the house while the husband was away overseas on duty as MAS air steward travelling on long haul flights.

This was the plaintiff's application for, *inter alia*, the following orders: (a) that the plaintiff be given interim custody, control and guardianship of two children of the marriage; (b) that the defendant be restrained from removing the children from the plaintiff's custody without the plaintiff's consent and from taking the children out of Malaysia; (c) that the defendant be restrained from assaulting, molesting, interfering or tampering with, threatening or otherwise beating the plaintiff and the children; (d) that the defendant by himself etc be disallowed from entering the house; and (e) that the defendant paid an interim maintenance.

Held:

(1) The husband's request for joint guardianship could not be said to be without any basis. Further, the absence of submission in reply for the wife would constitute the wife's tacit consent to the husband's prayer for joint guardianship. In the circumstances, the court made an order for joint guardianship of the children but the daily custody, care and control of the children shall remain vested in the wife (see para 18).

(2) Since a consent order had been made to restrain the husband from removing the children from the wife's custody, that consent order would include a removal of the children from the wife's custody to a place outside Malaysia. Hence, an additional order to that effect was unnecessary (see para 21).

(3) In interpreting, the expression 'during the pending in any matrimonial proceedings' in s 103 of the Law Reform (Marriage and Divorce) Act 1976 ('the 1976 Act'), the court was of the view that the procedural step taken by the wife in order to obtain a certificate from the conciliatory body under s 106 of the 1976 Act would be sufficient to trigger off the invocation of the 1976 Act as it constituted the pendency of matrimonial proceedings so that the wife was at liberty to apply for the injunction against molestation under s 103 of the 1976 Act. The court granted an injunction against molestation (see para 34); *Diana Clarice Chan Ching Hwa v Tiong Chiong Bum* [2002] 2 MLJ 97 and *R Saraswathy v R Palakritnan* [1986] 2 MLJ 127 followed.

(4) The essential requirement under s 13 of the Domestic Violence Act 1994 ('the 1994 Act') was that there must be criminal proceedings under the Penal Code where eg the husband had been charged with an offence. Since there was no such criminal proceeding against the husband, the wife was unable to avail herself of the protection order under s 13 of the 1994 Act (see para 38).

(5) Under s 5 of the 1994 Act, the court may make a protection order in proceedings involving a complaint of domestic violence, restraining the person against whom the order is made, such as in the instant case, the husband, from using domestic violence against the wife or the children. Such order might include a provision not to incite other people to commit violence against the protected person or persons. Upon a proper perusal of s 5 of the 1994 Act, it was clear that the only requirement was that there must be a proceedings involving a complaint of domestic violence. The wife had established a case within the ambit of s 5 of the 1994 Act (see para 40).

(6) Under s 6(1) of the 1994 Act, where the court was satisfied on a balance of probabilities that it was necessary for the protection and personal safety of the complainant (the wife) or the children, the court may act

to provide for, *inter alia*, the granting of the right of exclusive occupation to the wife and children of shared residence, regardless of whether the shared residence was solely owned by the person against whom the order is made; or prohibiting or restraining the husband from entering the wife and children's place of residence. The order under s 6(1) should have effect for a period not exceeding 12 months from the date of the order, provided that it might be further extended for a further maximum period of 12 months (s 6(2)(a) or (b) of the 1994 Act). The order should not affect the husband's title to or interest in the house: s 6(2) of the 1994 Act. Under s 6(4) of the 1994 Act, the court should not make an order excluding the husband from the whole of a shared residence that was solely owned by him unless it was satisfied that there was no other way to secure the personal safety of the wife and children. Such order, where made, in the case where the shared residence was solely owned by the husband, be revoked if a suitable residence was found for the wife and the children; or revoked or modified upon the court being satisfied that it was no longer necessary for securing the personal safety of the wife and the children (see para 57).

(7) In the light of ss 5 and 6 of the 1994 Act, the wife had established a case for the grant of an ouster order, but subject to a period of 12 months from the date hereof with liberty to apply for extension for another 12months. This ouster order will also subject to the exercise of the joint guardianship rights of the parties, so that if the husband wished to exercise his guardianship rights over the children of the marriage, the husband should give seven days' prior notice to the wife (see para 61).

(8) The husband had objectively performed the responsible role of a father in relation to the maintenance and welfare of the children. In the light of the husband's basic salary of RM1,800 and his commitments to the children, viz maintenance and insurance premium, a monthly maintenance of RM250 for the wife would be within the means of the husband and would meet with the needs of the wife who wass now residing in the matrimonial home at the expense of the husband (see paras 64 dan 67).

[**Bahasa Malaysia summary**

Defendan ('suami itu') telah membeli sebuah rumah yang didaftar di atas namanya. Pihak-pihak telah mendaftar perkahwinan sivil mereka pada 19Disember 1995. Pihak-pihak juga telah melangsungkan perkahwinan mengikut agama. Mereka tinggal dengan ibu bapa plaintif ('isteri itu'). Pihak-pihak telah dikurniakan dengan dua orang anak. Pihak-pihak telah menghadapi masalah-masalah dalam perkahwinan mereka, di mana suami itu tidak membenarkan isterinya memasuki rumah. Bagaimanapun, pada 5 Mac 2004, isteri itu telah memasuki rumah semasa suaminya berada di luar negara bertugas sebagai pramugara MAS dalam perjalanan jauh.

Ini adalah permohonan isteri untuk, *inter alia*, perintah-perintah berikut: (a) bahawa plaintif diberi hak penjagaan interim dan kawalan kedua-dua anak perkahwinan itu; (b) bahawa defendan dihalang daripada mengambil anak-anak itu daripada penjagaan plaintif tanpa kebenaran plaintif dan daripada membawa anak-anak itu keluar dari Malaysia; (c) bahawa defendan dihalang daripada menyerang, memperkosa, mengacau, mengancam atau memukul plaintif dan anak-anak mereka; (d) bahawa defendan secara persendirian dihalang daripada memasuki rumah; dan (e) bahawa defendan membayar nafkah interim.

Diputuskan:

(1) Permohonan suami itu untuk hak penjagaan bersama tidak boleh dikatakan tidak berasas. Lagipun, ketiadaan jawapan hujahan bagi isteri itu bermakna isteri itu bersetuju kepada permohonan suami untuk hak penjagaan bersama. Dalam situasi ini, mahkamah telah memerintahkan hak penjagaan bersama anak-anak itu tetapi hak penjagaan seharian dan kawalan anak-anak diberi kepada isteri itu (lihat perenggan 18).

(2) Oleh kerana satu perintah persetujuan telah pun dibuat untuk menghalang suami itu daripada mengambil anak-anak daripada penjagaan isteri, perintah persetujuan itu juga termasuk mengambil anak-anak daripada penjagaan isteri itu ke satu tempat di luar Malaysia. Maka, tidak perlu untuk satu perintah yang lain dengan kesan yang sama (lihat perenggan 21).

(3) Dalam menginterpretasikan ekspresi 'during the pending in any matrimonial proceedings' dalam s 103 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 1976 itu'), mahkamah berpendapat bahawa langkah-langkah prosedur yang diambil oleh isteri itu untuk mendapatkan satu sijil daripada badan pendamaian di bawah s 106 Akta 1976 itu sudah mencukupi untuk menggunakan Akta 1976 itu kerana ia berjumlah kepada penungguan prosiding hal-ehwal suami isteri agar isteri itu berhak memohon untuk satu injunksi terhadap perkosaan di bawah s 103 Akta 1976 itu. Mahkamah memerintahkan injunksi terhadap perkosaan (lihat perenggan 34); *Diana Clarice Chan Ching Hwa v Tiong Chiong Bum* [2002] 2 MLJ 97 dan *R Saraswathy v R Palakritnan* [1986] 2 MLJ 127 diikut.

(4) Keperluan yang penting di bawah s 13 Akta Keganasan Rumahtangga 1994 ('Akta 1994 itu') adalah bahawa mesti wujud satu prosiding jenayah di bawah Kanun Keseksaan di mana contohnya suami telah dituduh untuk satu kesalahan. Oleh kerana tiada prosiding jenayah seperti ini terhadap suami, isteri itu tidak boleh mendapatkan perlindungan di bawah s 13 Akta 1994 itu (lihat perenggan 38).

(5) Di bawah s 5 Akta 1994 itu, mahkamah boleh memerintahkan satu perintah perlindungan berkenaan pengaduan keganasan rumah tangga terhadap orang yang diperintahkan, dalam kes ini, suami itu, daripada melakukan keganasan terhadap isteri atau anak-anak. Perintah seperti

ini boleh mengandungi satu peruntukkan menghalang daripada menyuruh orang lain melakukan keganasan terhadap orang-orang yang dilindungi. Selepas pembacaan teliti s 5 Akta 1994 itu, adalah jelas bahawa satu-satu keperluan s 5 adalah mesti wujud prosiding yang melibatkan pengaduan keganasan rumah tangga. Isteri itu telah membuktikan kes dalam lingkungan s 5 Akta 1994 itu (lihat perenggan 40).

(6) Di bawah s 6(1) Akta 1994 itu, di mana mahkamah berpuas hati atas imbangan kebarangkalian bahawa ada keperluan untuk perlindungan dan keselamatan peribadi pengadu (isteri itu) atau anak-anak, mahkamah boleh bertindak untuk, *inter alia*, memberikan hak pendiaman eksklusif rumah pendiaman yang dikongsi kepada isteri dan anak-anak, tidak kira pada masa itu tempat kediaman itu milikan tunggal orang yang diperintahkan, atau menghalang dan tidak membenarkan suami daripada memasuki tempat kediaman isteri dan anak-anak. Perintah di bawah s 6(1) mempunyai kesan untuk tempoh tidak melebihi 12 bulan daripada tarikh perintah, dan ia boleh dilanjutkan untuk satu tempoh maksimum selama 12 bulan (s 6(2)(a) atau (b) Akta 1994 itu). Perintah itu tidak ada kesan terhadap milikan atau kepentingan suami berhubung dengan rumah itu (s 6(2) Akta 1994 itu). Di bawah s 6(4) Akta 1994 itu, mahkamah tidak patut memerintahkan suami diasingkan daripada keseluruhan tempat kediaman yang dikongsi bersama yang dimilikinya secara tunggal kecuali tiada cara lain untuk menjamin keselamatan peribadi isteri dan anak-anak. Perintah seperti ini, sekiranya diperintahkan, di mana tempat kediaman yang dikongsi adalah milikan tunggal suami, boleh ditarik balik jika satu tempat kediaman yang sesuai dijumpai untuk isteri dan anak-anak, atau ditarik balik atau di tukar sekiranya mahkamah berpuas hati bahawa tiada keperluan lagi untuk melindungi keselamatan peribadi isteri dan anak-anak (lihat perenggan 57)

(7) Memandangkan ss 5 dan 6 Akta 1994 itu, isteri telah membuktikan satu kes untuk perintah penyingkiran, tetapi hanya untuk tempoh 12 bulan daripada tarikh ini dan mempunyai hak untuk memohon untuk perlanjutan 12 bulan. Perintah penyingkiran juga tertakluk kepada hak penjagaan bersama pihak-pihak di mana sekiranya suami itu ingin mengunakan hak penjagaan ke atas anak-anaknya, suami itu sepatutnya memberi 7 hari notis kepada isteri (lihat perenggan 61).

(8) Suami telah secara objektif menunaikan tanggungjawabnya sebagai bapa berhubung dengan nafkah dan hal kebajikan anak-anak. Memandangkan gaji suami sebanyak RM1,800 dan komitmennya terhadap anak-anak iaitu nafkah dan premium insuran, nafkah bulanan sebanyak RM250 untuk isteri adalah dalam kemampuan suami dan cukup untuk isteri yang sekarang sedang tinggal di rumah perkahwinan yang dibiayai suami (lihat perenggan 64 dan 67).]

Notes

For a case exclusion order, see 7(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 3281.
For a case on matrimonial property, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3308.
For cases on custodianship of children, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2727–2837.
For cases on maintenance, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3120–3146.

Cases referred to

Chan Ah Moi v Phang Wai Ann [1995] 3 MLJ 130 (refd)
Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 109 (refd)
Diana Clarice Chan Ching Hwa v Tiong Chiong Bum [2002] 2 MLJ 97 (folld)
Gurasz v Gurasz [1969] 3 All ER 822 (refd)
Immetec Sdn Bhd v Yong Tai Hoong & Anor [1995] 1 MLJ 390 (refd)
Jayakumari a/p Arul Pragasam v Suriya Narayanan a/l V Ramanathan [1996] 4 MLJ 421 (refd)
Phua Seng Hong v Ho Shik Ho [2000] 2 MLJ 289 (refd)
R Saraswathy v R Palakritnan [1986] 2 MLJ 127 (folld)
Tan Boon Liang v Lim Tiong Sin [1997] 4 MLJ 485 (refd)
Teh Bee v K Maruthamuthu [1977] 2 MLJ 7 (refd)
Wong Kim Foong (f) v Teau Ah Kau @ Chong Kwong Fatt [1998] 1 MLJ 359 (refd)

Legislation referred to

Civil Law Act 1956 s 3
Domestic Violence Act 1994 ss 4, 5, 6, (1), (2)(a), (b), (4), 13
Guardianship of Infants Act 1961 s 5
Interpretation Acts 1948 and 1967 s 17A
Law Reform (Marriage and Divorce) Act 1976 ss 76(2), 77(1)(a), 88(3), 103, 106
National Land Code 1965 s 340(1)
Penal Code s 326

RR Singham (Prema Joseph with him) (RR Singham) for the defendant.
R Ledchumiah (Ramamoorthy Letchumiah & Co) for the plaintiff.

Low Hop Bing J:

I APPLICATIONS

[1] There are two applications for determination.

[2] The first is the plaintiff's application by way of originating summons in encl 2 which prays for the following orders :

(a) that the plaintiff be given interim custody, control and guardianship of two children of the marriage aged six years three months and five years four months respectively;

(b) that the defendant be restrained from removing the children from the plaintiff's custody etc without the plaintiff's consent and from taking the children out of Malaysia;

(c) that the defendant whether by himself, servant, agent, relative or members of his family be restrained from assaulting, molesting, interfering or tampering with, threatening or otherwise beating, *inter alia*, the plaintiff and the children until further order or final disposal of this action;

(d) that the defendant whether by himself etc be restrained from approaching, *inter alia*, the plaintiff and the children within a distance of 100 feet until further order or final disposal of this action;

(e) that the defendant by himself etc be disallowed from entering the matrimonial home occupied by the plaintiff at 1753 Taman Mock Sum, Jalan Rasah, 70300 Seremban ('the house') and/or the plaintiff's family house or other house occupied by the plaintiff until further order or final disposal of this action;

(f) that the defendant do pay an interim maintenance of RM2,000 per month for the plaintiff and the children from January 2004 and subsequently before the 7th day of each month until further order, to be credited to the plaintiffs account at HSBC Bank, Seremban Branch, Deposit A/C No 351–224514–011;

(g) costs to be borne by the defendant; and

(h) such other orders as the court deems fit.

[3] The other application is the defendant's summons in chambers in encl 14 seeking:

(a) joint guardianship of the children under s 5 of the Guardianship of Infants Act 1961 ('s 5 of the 1961 Act');

(b) weekly overnight access of the children to the defendant when the defendant returns from his long haul flights or in accordance with his flight schedule which the defendant shall inform the plaintiff in advance;

(c) alternative overnight access to the children during festivals and birthdays;

(d) defendant shall provide alternative accommodation for the plaintiff and the children;

(e) the defendant's personal effects be removed from the house and be returned to him; and

(f) the plaintiff do return to th« defendant one set of the Wira Aeroback car keys.

A II FACTUAL BACKGROUND

[4] On 27 November 1995, the defendant ('the husband') purchased the house which was registered in the husband's name on 17 October 2000.

[5] The parties registered their civil marriage on 19 December 1995.

B

[6] On 1 June 1996, the parties solemnised their religious marriage. They resided with the plaintiffs (wife's) parents in Taman Rasah Jaya, Seremban.

[7] On 19 December 1997, they were blessed with the first child of the marriage.

C

[8] The parties moved into the house in mid-1998 upon its completion at the end of 1997 and they carried out renovations thereto.

[9] On 18 November 1998, they were blessed with another child.

D **[10]** In January 2004, the parties encountered problems in their marriage, after which the husband had denied the wife entry to the house.

[11] However on 5 March 2004, the wife moved into the house while the husband was away overseas on duty as MAS air steward travelling on long haul flights.

E **[12]** The wife attended to housekeeping, cooking, cleaning and taking care of the children.

III AGREED PRAYERS

F **[13]** The husband has no objection to the wife's custody of the children in prayer (a) and the first limb of prayer (b) in encl 2. In the circumstances, by consent, I made an order in terms thereof.

IV GUARDIANSHIP

G

[14] In seeking joint guardianship for the husband, learned counsel Mr RR Singham assisted by Ms Prema Joseph relied on s 5 of the 1961 Act.

[15] Mr R Ledchumiah, learned counsel for the plaintiff, does not appear to provide any response to this submission.

H **[16]** In my judgment, s 5 of the 1961 Act, where relevant, as amended vide Act A1066 with effect from 1 October 1999, merits reproduction as follows:

> 5 Equality of parental rights.
>
> (1) In relation to the custody or upbringing of an infant; a mother shall have the same rights and authority as the law allows to a father, and title rights and authority of mother and father shall be equal.

I

(2) The mother of an infant shall have the like powers of applying to the court in respect of any matter affecting the infant as are possessed by the father.

[17] The provisions of s 5 are clear and unambiguous in that the parents may be given joint guardianship. In this regard, it is pertinent to point out that s 11 thereof requires the court to have regard primarily to the welfare of the infant and the wishes of the infant's parents.

[18] As the father of the children and on the basis of the above factual background, I am of the view that the husband's request for joint guardianship cannot be said to be without any basis. Further, the absence of submission in reply for the wife would in my view constitute the wife's tacit consent to the husband's prayer for joint guardianship. In the circumstances, I make an order for joint guardianship of the children but the daily custody, care and control of the children shall remain vested in the wife.

V REMOVAL OF CHILDREN: PRAYER (B) SECOND LIMB

[19] The contention for the husband is that the wife's application to restrain the husband from removing the children from the wife's custody without the wife's consent is baseless as the defendant has never taken the children out of Malaysia.

[20] On this issue, I am unable to find any reply presented for the wife.

[21] In my judgment, since a consent order has been made to restrain the husband from removing the children from the wife's custody as alluded to in the first limb of prayer (b) above, that consent order would include a removal of the children from the wife's custody to a place outside Malaysia. Hence, an additional order to that effect is unnecessary.

VI INJUNCTION AGAINST MOLESTATION: PRAYER (C)

[22] The husband has objected to the wife's prayer for injunction against molestation on the ground that there was no pending matrimonial proceeding for divorce or judicial separation. Section 103 of the Law Reform (Marriage and Divorce) Act 1976 ('the 1976 Act') was referred to.

[23] It was argued for the wife that the 1976 Act would immediately come into motion once a step has been taken by the wife who has obtained a certificate from the conciliatory body under s 106 of the Act. Support was sought in *Diana Clarice Chan Ching Hwa v Tiong Chiong Bum* [2002] 2 MLJ 97 (CA); and *R Saraswathy v R Palakritnan* [1986] 2 MLJ 127 (SC).

[24] I shall first refer to the relevant portion of s 103 in the following words:

> 103 Injunction against molestation.
>
> The court shall have power during the pendency of any matrimonial proceedings, to order any person to refrain from forcing his or her society on his or her spouse and from other acts of molestation.

[25] In my view, s 103 sets out the stage at which an injunction against molestation may be made e.g. during the pendency of any matrimonial proceedings.

[26] The question that calls for determination here is whether the court is empowered to grant an injunction against molestation at this stage of the proceedings when no matrimonial proceedings had been presented by the wife.

[27] For this purpose, the judgment of the Court of Appeal delivered by Siti Norma Yaakob JCA (now CJ(M)) in *Diana Clarice Chan Ching Hwa* has a direct bearing. The facts of that case showed that there were two applications before the judge of the first instance viz the wife's application for custody of the four children of the marriage; and the husband's application for their custody. Nodivorce proceedings had been commenced by amy of the parties, although the wife had already taken the necessary step of filing a reconciliation application to a conciliatory body under s 106 of the 1976 Act. The first instance judge ruled that he had no jurisdiction to entertain the wife's application for maintenance under s 77(1)(a) of the same Act.

[28] On appeal, the Court of Appeal held, at p 725 c–h, that the first instance judge had erred, as the 1976 Act is a social legislation for which a liberal interpretation is more apt than a strict one, and so matrimonial proceedings need not necessarily commence with the filing of a petition for divorce etc, as any step taken by a party under the 1976 Act such as the application for reconciliation as a prelude to bringing the marriage to an end is sufficient to put s 77(1)(a) into motion.

[29] Another enlightening authority is *R Saraswathy* where the wife had invoked s 88(3) of the 1976 Act and applied by way of an originating summons for custody of the only child of the marriage. There was no pending action for divorce between the parties. The learned trial judge held that s 88(3) could not be invoked.

[30] On appeal, the then Supreme Court in a judgment delivered by Wan Suleiman SCJ (as he then was) held, *inter alia*, that in the state of affairs surrounding the appeal, the application under s 88(3) was properly made as there would be no need for the parties to wait until perhaps the unlikely event of their commencing a divorce action before making such application.

[31] Although the aforesaid two authorities were based on two applications viz for maintenance and custody respectively, I have applied the principles

enunciated therein *mutatis mutandis* to an application for an injunction against molestation under s 103, by applying the liberal interpretation in preference to a literal interpretation.

[32] In addition, I would also apply the purposive approach which has now found statutory expression in s 17A of the Interpretation Acts 1948 and 1967 which reads :

> Regard to be had to the purpose of Act
>
> 17A In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[33] The purposes of the 1976 Act have been set out in the long title to the Act and include, *inter alia* the consolidation of the law relating to divorce and to provide for matters incidental thereto.

[34] In interpreting the expression 'during the pending in any matrimonial proceedings', I am of the view that the procedural step taken by the wife in order to obtain a certificate from the conciliatory body under s 106 of the 1976 Act would be sufficient to trigger off the invocation of the 1976 Act as it constitutes the pendency of matrimonial proceedings so that the wife is at liberty to apply for the injunction against molestation under s 103 of the 1976 Act. On the facts of this case, I am unable to sustain the contention for the husband. In favour of the wife, I therefore grant an injunction against molestation.

VII RESTRAINING ORDER

[35] The stand taken for the husband is th»t the order sought by the wife under the Domestic Violence Act 1994 ('the 1994 Act') cannot be made as there was no pending criminal proceeding.

[36] It was conceded for the wife that no criminal charges were pending against the husband but the wife relied on the several police reports lodged by her complaining of domestic violeince by the husband.

[37] I find it pertinent to refer to s 13 of the 1994 Act which provides for the circumstances under which a protection order may be sought, as follows:

> 13 When protection order may be sought.
>
> A protection order may be sought during any criminal proceedings under the Penal Code wtoene the accused is charged with an offence committed under circumstances that fall within the definition of 'domestic violence':
>
> (a) as a condition of the accused's release on bail or at any other stage of the proceedings; or
>
> (b) upon the compounding of such offence under s 260 of the Criminal Procedure Code.

[38] However, the essential requirement under s 13 is that there must be criminal proceedings under the Penal Code where eg the husband has been charged with an offence. Since there was no such criminal proceeding against the husband, the wife is unable to avail herself of the protection order under s 13.

[39] That does not preclude the wife from relying on s 5 of the 1994 Act which reads:

> 5 Protection order
>
> (1) The court may, in proceedings involving a complaint of domestic violence, issue any one or more of the following protection orders:
>
> (a) a protection order restraining the person against whom the order is made from using domestic violence against the complainant;
>
> (b) a protection order restraining the person against whom the order is made from using domestic violence against the child;
>
> (c) a protection order restraining the person against whom the order is made from using domestic violence against the incapacitated adult.
>
> (2) The court in making a protection order under para (1)(a) or (b) or (c) may include a provision that the person against whom the order is made may not incite any other person to commit violence againat the protected person or persons.

[40] Under s 5 of the 1994 Act, the court imay make a protection order in proceedings involving a complaint of domestic violence, restraining the person against whom the order is made, such as in the instant case, the husband, from using domestic violence against the wife or the children; and such order may include a provision not to incite other people to commit violence against the protected person or persons.

[41] Upon a proper perusal of s 5 of the 1994 Act, it is clear to me that the only requirement is that there must be proceedings involving a complaint of domestic violence.

[42] In this regard, the affidavits of the parties herein do reveal conflicting versions in material particulars concerning the existence or otherwise of domestic violence.

[43] Be that as it may, there can be no doubt in my mind that there are complaints in the form of police reports lodged by the wife in relation to domestic violence and that these complaints are now an integral part of the instant proceedings. That being the case, the wife has in my view established a case within the ambit of s 5 of the 1994 Act. I therefore make an order in terms of prayer (d) in favour of the wife and children of the marriage only. This is however subject to the exercise of the husband's rights as a joint guardian under s 5 of the 1961 Act in prayer (a) above, for which a seven-day prior notice must be given by the husband to the wife.

VIII OUSTER ORDER: PRAYER (E)

[44] It was contended for the husband that:

(1) for the ouster order in prayer (e), there must be evidence of domestic violence or criminal proceedings against the husband. Support was sought in ss 5 and 6 of the 1994 Act; *Chan Ah Moi v Phang Wai Ann* [1995] 3 MLJ 130 (HC); *Tan Boon Lang v Lim Tiong Sin* [1997] 4 MLJ 485 (HC) (Brunei); and *Jayakumari a/p Arul Pragasam v Suriya Narayanan a/l V Ramanathan* [1996] 4 MLJ 421; and

(2) the defendant as the registered owner of the house has an indefeasible title to the house, on the basis of s 340(1) of the National Land Code 1965 ('s 340(1)'); *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7; and *Immetec Sdn Bhd v Yong Tai Hoong & Anor* [1995] 1 MLJ 390.

[45] The submission for the wife is that:

(1) the house is a matrimonial home on the basis of *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109 (CA); *Wong Kim Foong (f) v Teau Ah Kau @ Chong Kwong Fatt* [1998] 1 MLJ 359 (HC); and *Phua Seng Hong v Ho Shik Ho* [2000] 2 MLJ 289; and

(2) the husband should be denied access to the house as it is impossible for both the parties to live together, referring to *Jayakumari a/p Arul Pragasam*; *Gurasz v Gurasz* [1969] 3 All ER 822.

[46] From the above submissions, I find a common ground that the husband as the registered proprietor of the house has an indefeasible title thereto under s 340(1); *Teh Bee*, at p 12H left; *Immetec Sdn Bhd*. Hence, the husband's title to or interest in the house should not be prejudicially affected: s 6(2) of the 1994 Act.

[47] Since upon the completion of the house, it has been occupied by the parties and their children, and the wife has attended to housekeeping etc. during the subsistence of the marriage and even, presently, I am of the view that it is their matrimonial asset or home.

[48] Support for my view may be found in *Ching Seng Woah*, where the Court of Appeal through the judgment of Mahadev Shatikar JCA (as he then was) explained at p 122F–G that during the subsistence of a marriage, the expression 'matrimonial asset' refers to the matrimonial home and everything which is put into it by either spouse with the intention that their home and chattels should be a continuing resource for the spouses and their children to be used jointly and severally for the benefit of the family as a whole, and that it matters not whether the asset was acquired solely by the one party or the other or by joint efforts.

[49] A liberal view is taken in ascertaining the meaning of a matrimonial asset. The married couple in *Wong Kim Foong* bought a house in contemplation of their marriage. That house was subsequently sold and another house was bought. The wife did not get a share of the proceeds of sale of the first house. The title deeds showed equal ownership to the two houses. For the purposes of division of matrimonial asset, Abdul Malik Ishak J took a broad view that the contributions made by the parties to the two houses were matrimonial assets for equal distribution under s 76(2) of the 1976 Act.

[50] Another illustration is provided in *Phua Beng Hong* where a house acquired solely by the husband during the subsistence of the marriage and a motor car which the wife had the use and possession for six years from its acquisition were held by the Court of Appeal, per Dennis Ong JCA, to be matrimonial assets and subject to division under s 76.

[51] Having disposed of the issue pertaining to matrimonial asset, I shall now consider whether or not the court has the jurisdiction to make the ouster or exclusion order against the husband.

[52] A similar issue arose in *Jayakumari,* James Foong J (now JCA) followed *Gurasz v Gurasz* of England and held that although the 1976 Act does not provide for such a relief, and the 1994 Act had not yet come into force then, the court was entitled to protect the right of a wife to remain in the matrimonial home, and that the court has jurisdiction to grant the relief to evict a husband from the matrimonial home pending the trial of the action. This authority was also cited for the husband but I am unable to see how it is of any assistance to him.

[53] In *Chan Ah Moi* the wife applied for a non-molestation order against the husband and an order to exclude him from any part of the matrimonial home in which she was residing and the area where the matrimonial home was located. Abdul Malik Ishak J allowed the non-nolestation order under s103 of the Law Reform (Marriage and Divorce) Act 1976, and although the 1976 Act contains no provision for an exclusion order, the learned judge held that the English common law can be invoked under s 3 of the Civil Law Act 1956, thereby granting the exclusion order, as the husband had brutally attacked the wife and been sentenced to four and a half years' imprisonment under s. 326 of the Penal Code on 7 October 1992, before the 1994 Act had been legislated, The learned judge added that had the 1994 Act been legislated, s13 thereof would have empowered the court to make the exclusion order.

[54] In *Tan Boon Liang* the wife had obtained an ouster order from a magistrate against the husband on 6 February 1996. The husband's appeal was allowed by the Brunei High Court but an interim order in the same terms was made with a return date of 2 April 1996. In considering whether the ouster order should be continued, Penlington J gave the answer in the affirmative.

[55] In the circumstances, I am of the view that *Chan Ah Moi* and *Tan Boon Liang* cited for the husband were unsuppoiftive of the husband's contention.

[56] On my part, I would refer to ss 5 and 6 of the 1994 Act which now empower the court dealing with proceedings involving a complaint of domestic violence to issue any one or more of the protection orders. I have dealt with s 5 of the 1994 Act above.

[57] Under s 6(1) of the 1994 Act, where the court is satisfied on a balance of probabilitiett that it is necessary for the protection and personsal safety of the complainant (the wife herein) or the children, the court may act to provide for, *inter alia*:

(a) subject to sub-s (4), the granting of the right of exclusive occupation to the wife and children of shared residence, regardless of whether tine shared residence is solely owned by the person against whom the order is made; or

(b) prohibiting or restraining the husband from entering the wife and children's place of residence.

[58] The order under s 6(1) shall have effect for a period not exceeding 12months from the date of the order, provided that it may be further extended for a further maximum period of 12 months: s 6(2)(a) or (b).

[59] The order shall not affect the husband's title to or interest in the house: s 6(2).

[60] Under s 6(4), the court shall not make an order excluding the husband from the whole of a shared residence that is solely owned by him unless it is satisfied that there is no other way to secure the personal safety of the wife and children, and such order, where made, shall in the case where the shared residence is solely owned by the husband,

(a) revoked if a suitable residence is found for the wife and the children; or

(b) revoked or modified upon the court being satisfied that it is no longer necessary for securing the personal safety of the wife and the children.

[61] In the light of ss 5 and 6 of the 1994 Act, I am of the view that the wife has established a case for the grant of an ouster order which I hereby grant, but subject to a period of 12 months from the date hereof with liberty to apply for extension for another 12 months. This ouster order is also sutoject to the exercise of the joint guardianship rigihts of the parties herein, so that if the husband wishes to exercise his guardianship rights over the children of the marriage, the husband shall give seven days' prior notice to the wife.

IX MAINTENANCE: PRAYER (F)

[62] The husband's counsel brought to my attention that under s 77 of the 1976 Act, the wife is not entitled to any maintenance at this stage as there are no pending matrimonial proceedings.

[63] There is no reply from the wife's counsel in this regard. This gives me the impression that the issue of maintenance for the wife has not been pursued vigorously.

[64] My perusal of the affidavits filed herein leads me to the finding of undisputed fact that the husband's monthly basic salary as an air steward is RM1,800, out of which he has complied with the order of the court to pay a monthly sum of RM500 towards the maintenance of the children of the marriage, and the children's monthly insurance premium of RM600. In my view, the husband has objectively performed the responsible role of a father in relation to the maintenance and welfare of the children.

[65] However, s 77(1)(a) of the 1976 Act provides that the court may order a man to pay maintenance to his wife during the course of any matrimonial proceedings. This section has been considered by the Court of Appeal in *Diana Clarice Chan Ching Hwa*, which I have analysed above, and it was held that in the circumstances pfevailing in this case, the court is empowered to order maintenance.

[66] For the purpose of assessing the amount of maintenance for the wife, s 78 of the 1976 Act provides that the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.

[67] In the light of the husband's basic salary of RM1,800 and his commitments to the children above, viz maintenance and insurance premium, I am of the view that a monthly maintenance of RM250 for the wife would be within the means of the husband and would meet with the needs of the wife who is now residing in the matrimonial home at the expense of the husband. I order this maintenance to take effect from 1 August 2005.

X CONCLUSION

[68] The above orders cover the two enclosures under consideration and shall only affect the parties herein.

[69] The parties herein are also directed to comply with these orders peaceably and harmoniously so as to avoid any committal proceedings which may arise from their contravention of the orders herein as a result of the obvious acrimony and animosity which both parties have exhibited in the course of these proceedings.

[70] They are well advised to leave behind their bitter past and move forward for the purpose of giving effect to the welfare of their children who are after all the cystallisation of their love which they have hitherto happily shared, at least during the subsistence of their marriage and before the instant proceedings.

XI COSTS

[71] On the factual background and circumstances of this case, I order the parties herein to bear their own costs respectively.

Order accordingly.

Reported by Peter Ling